

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALAN NEWMAN	:	ORDER
	:	DTA # 820300
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Periods June 1, 1999 through	:	
November 30, 1999 and March 1, 2000 through	:	
August 31, 2000.	:	

Petitioner, Alan Newman, 14 Macintosh Lane, Monsey, New York 10952, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1999 through November 30, 1999 and March 1, 2000 through August 31, 2000.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (Michele W. Milavec, Esq., of counsel), filed a motion on May 5, 2005 for an order precluding petitioner from offering particulars at hearing in respect of matters which the Division of Taxation has demanded particularization that petitioner has not provided. The Division of Taxation submitted the affirmation of Michele W. Milavec, Esq., dated May 4, 2005, with annexed exhibits, in support of its motion. Petitioner did not respond to the motion of the Division of Taxation. Pursuant to 20 NYCRR 3000.5(d) and 3000.6, the 90-day period for issuance of this order commenced June 3, 2005. Based upon the motion papers, the affidavit and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioner commenced this proceeding by filing a petition with the Division of Tax Appeals on December 17, 2004. The petition was filed in protest of a Notice of Determination (L-022986159-2), dated October 2, 2003, which asserted \$23,266.63 in additional sales and use taxes due, plus penalty and interest, for the periods June 1, 1999 through November 30, 1999 and March 1, 2000 through August 31, 2000. Before filing his petition, petitioner filed a request for conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services. Following a conciliation conference, the Bureau of Conciliation and Mediation Services issued a Conciliation Order dated October 29, 2004, which sustained the statutory notice at issue. The conciliation order noted that petitioner had previously paid \$23,266.63 toward the amount due on the notice.

2. The Division of Taxation ("Division") filed its answer to the petition on February 23, 2005.

3. On March 24, 2005, by certified mail, return receipt requested, the Division served a demand for a bill of particulars on petitioner's duly appointed representative, Alan P. Licciardello, CPA. Postal Service Form 3811, Domestic Return Receipt, indicates that the demand for bill of particulars was delivered to petitioner's representative on March 26, 2005.

4. The Division's demand for bill of particulars requests as follows:

[s]tate in detail the basis for the allegation contained in paragraph 1 of section (6) of the petition which alleges that, "The total amount paid, 3 years probation and the 100 hours of community service was considered full restitution and was agreed upon", including:

a) a detailed description of the alleged plea agreement, including the exact terms of the alleged plea agreement and attach a copy of the alleged plea agreement.

5. Petitioner did not respond to the bill of particulars within 30 days after the demand, as required by 20 NYCRR 3000.6(a)(2).

6. On June 3, 2005, petitioner's representative forwarded to the Division a copy of a letter dated May 23, 2005 written by Howard L. Jacobs, Esq. The Division's representative forwarded the letter to the Division of Tax Appeals on June 7, 2005. Mr Jacobs represented Mr. Newman in the case of *People v. Newman* in the Criminal Court in the County of Albany. The letter provides, in part, as follows:

Enclosed is the letter to the Assistant District Attorney resulting from the guilty plea, the agreement and confirmation of our understanding of the penalties and the term full restitution which should take into account all interest and penalties. We, at the time, assumed upon signing the agreement, the case was settled and in no way would we be called upon again to pay any additional amounts, whether criminally or civilly.

A copy of the agreement mentioned in Mr. Jacobs's letter was not included in the documentation received by this office.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure permit the use of a bill of particulars in proceedings in the Division of Tax Appeals. Specifically, section 3000.6(a) of the Rules provides as follows:

(1) After all pleadings have been served, a party may wish the adverse party to supply further details of the allegations in a pleading to prevent surprise at the hearing and to limit the scope of the proof. For this purpose, a party may serve written notice on the adverse party demanding a bill of particulars within 30 days from the date on which the last pleading was served.

(2) The written demand for a bill of particulars must state the items

concerning which such particulars are desired. If the party upon whom such demand is served is unwilling to give such particulars, he or she may, in writing to the supervising administrative law judge, make a motion to the tribunal to vacate or modify such demand within 20 days after receipt thereof. The motion to vacate or modify should be supported by papers which specify clearly the objections and the grounds for objection. If no such motion is made, the bill of

particulars demanded shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise.

(3) In the event a party fails to furnish a bill of particulars, the

administrative law judge designated by the tribunal may, upon motion, issue an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered. A motion for such relief shall be made within 30 days of the expiration of the date specified for compliance with the request.

(4) Where a bill of particulars is regarded as defective by the party upon

whom it is served, the administrative law judge designated by the tribunal may, upon notice, make an order of preclusion or direct the service of a further bill. In the absence of special circumstances, a motion for such relief shall be made within 30 days after the receipt of the bill claimed to be insufficient.

(5) A preclusion order may provide that it will be effective unless a proper bill is served within a specified time.

B. As noted above, the Rules provide that a party may serve a demand for a bill of particulars upon an adverse party in order “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.6[a][1]). Generally, under the CPLR, a party need particularize only those matters upon which it has the burden of proof (*see, Holland v. St. Paul Fire & Marine Ins. Co.*, 101 AD2d 625, 475 NYS2d 156, 157). In proceedings in the Division of Tax Appeals a presumption of correctness attaches to a notice of deficiency and the petitioner bears the burden of overcoming that presumption (*see, e.g., Matter of Estate of Gucci*, Tax Appeals Tribunal, July 10, 1997 citing *Matter of Atlantic & Hudson*, Tax Appeals Tribunal, January 30, 1992).

C. With respect to the demand for a bill of particulars, petitioner was requested to furnish a bill with respect to his claim that “the total amount paid, 3 years probation and the 100 hours of community service was considered full restitution and was agreed upon.” Petitioner provided to the Division, after the filing of the motion to preclude, a letter which indicated that the basis for the claim was the understanding reached between petitioner’s criminal attorney and

the District Attorney's Office that payment of the tax due satisfied all amounts claimed due by the Notice of Determination issued to petitioner. This response by petitioner provided the Division with the underlying factual basis for the claim that no additional amounts are due, and therefore is determined to be an adequate response to the Division's bill of particulars.

D. The demand for a bill of particulars seeks the production of documents, including a request for "a detailed description of the alleged plea agreement, including the exact terms of the alleged plea agreement and attach a copy of the alleged plea agreement." It is not the function of a bill of particulars to provide evidentiary material (*Frequency Electronics, Inc. v. We're Associates Co.*, 90 AD2d 822, 456 NYS2d 20). The supplying of evidentiary material is not the task of a bill of particulars, which is supposed to offer a more expansive statement of the pleader's contentions rather than the evidentiary basis on which the claim is based. Furthermore, the Rules of Practice preclude an administrative law judge from entertaining a motion for prehearing discovery (*see*, 20 NYCRR 3000.5[a]). Accordingly, petitioner is not required to produce any documentation relating to its claim that the plea agreement reached in the criminal matter satisfied all amounts claimed due by the Division.

E. The Division of Taxation's motion for an order of preclusion is denied.

DATED: Troy, New York
June 23, 2005

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE